Shaik (Migration) [2024] ARTA 222 (28 November 2024)

Decision and

Reasons for Decision

Applicant:	Ms Amrin Noor Shaik
Respondent:	Minister for Immigration and Multicultural Affairs
Tribunal Number:	2306916
Tribunal:	Senior Member G. Cullen
Place:	Sydney
Date:	28 November 2024
1.	**Decision:** The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.
2.	

Statement made on 28 November 2024 at 10:32am

CATCHWORDS
MIGRATION – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – bogus document provided with visa application – completion certificate for diploma course found to be non-genuine – discretion to waive criterion – non-compliance conceded – claim that application prepared by agent – no agent's name appears and claim not made in notification of incorrect information to department – successful study history not compassionate or compelling circumstances – decision under review affirmed

LEGISLATION
Migration Act 1958 (Cth), ss 5(1), 65, 359A, 375A
Migration Regulations 1994 (Cth), r 1.03, Schedule 2, cl 500.217(1), Schedule 4, criterion 4020(1), (5)

CASES
Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50

Statement of reasons

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 28 April 2023 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).

4. The applicant applied for the visa on 27 February 2020. At the time of application, Class TU contained two subclasses: Subclass 500 (Student) and Subclass 590 (Student Guardian). The applicant applied for the visa to undertake study in Australia and does not claim to meet the criteria for a Subclass 590 (Student Guardian) visa.

5. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 500.217(1) of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because she did not meet Public Interest Criterion 4020 (PIC 4020) as she had given or caused to be given a bogus document. Specifically, when applying for the Student visa on 27 February 2020 attached to the application was a Diploma of Business completion certificate issued on 11 November 2019 by HB Training Trading as Grace Training Institute. The Department noted that investigations undertaken by it revealed the document to be non-genuine.

6. The Department file indicates that on 27 January 2021 the applicant appointed an authorised migration agent, Sheikh Mohhamad Akheel, and all correspondence to the applicant from the Department was then sent to this agent's email including the Department's decision .

7. On 29 September 2021 the Department sent to the applicant an invitation to comment on the above-mentioned adverse information raising with her that there is evidence suggesting she has provided, or caused to be provided, a bogus document which would result in a failure to satisfy PIC 4020(1). The delegate also referred to PIC 4020(4) and requested information as to whether the requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen, that justify the granting of the visa.

8. On 16 March 2022 the applicant via her new representative provided a Notification of Incorrect Answers. She requested the Department withdraw the incorrect details in the application in reference to achieving the Diploma of Business at HB Training studied from 12 November 2018 to 11 November 2019. In that form she indicated the following.

> I wish to withdraw the course mentioned "Diploma of Business" from HB Training due to the uncertain news that came across to me recently. I tried to contact the institute, but the college is not responding to any of my calls and emails. This is making me feel unsafe about my career and hence I have recently even lodged a complaint against the institute for not being generous to answer my queries on the degree and the documents.
>
> Hence, I request you to kindly not to consider the "Diploma of Business" as the course of my study. I request you please withdraw the above-mentioned qualification from my qualification.

9. She also provided evidence as to meeting the financial capacity requirements and evidence as to her past study.

10. Following the refusal by the delegate on 28 April 2023 , the applicant lodged an application for review of the delegate's decision with the former Administrative Appeals Tribunal (the AAT) on 19 May 2023. No representative was appointed.

11. On 14 October 2024, the AAT became the Administrative Review Tribunal (the Tribunal). Under the transitional provisions in the *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024* (the Transitional Act), applications for review to the AAT that were not finalised before 14 October 2024 are taken to be an application for review to the Tribunal. The Transitional Act gives the Tribunal the authority to continue and finalise any aspect of the review not already completed by the AAT. This decision and statement of reasons is made by the Tribunal.

12. With her application she provided evidence of her current and past study in Australia.

13. The applicant appeared before the Tribunal by video on 25 November 202 to give evidence and present arguments. The applicant was assisted with an interpreter in the Hindi and English languages.

14. The Tribunal outlined the requirements of PIC 4020 including the waiver provision. It advised the applicant that the issue before the Tribunal is whether there is evidence that the applicant has given, or caused to be given, a bogus document in relation to the application for the current visa. It referred to s.5(1) as to the definition of a bogus document. It referred to the evidence from the Department's verification checks outlined above. Her evidence is considered below.

15. It asked her whether there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa.

16. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

17. **Section 375A certificate of non-disclosure**

18. A certificate was issued by the Minister for Immigration under s 375A of the Act certifying that disclosure of a certain document on her file would be contrary to the public interest.

19. On 24 September 2024 the Tribunal wrote to the applicant attaching a copy of the certificate, advising her that it considered the certificate to be valid, inviting her to comment on its validity. It raised with her that its preliminary view is that the certificate contains a ground of public interest immunity not to disclose the information.

20. The applicant did not respond.

21. At the hearing, the Tribunal advised that it considered the certificate to be valid. It referred to its previous letter sent to the applicant in regard to the certificate, which outlined the reasons given by the Department for the certificate.

22. The Tribunal outlined at hearing, via the process outlined in s 359A, the information it covered. In particular, it noted it was a dob-in to the Department alleging the applicant was using fake documents, came to Australia and changed from a Visitor visa to a Student visa and that she was planning a fake marriage. The Tribunal raised with her as the motivation of the person supplying the dob-in could not be ascertained and that person was unable to be questioned, it placed no weight on the dob-in. It raised with her that the information

contained in the document referred to in the non-disclosure certificate had no bearing on its decision with regard to the matters before the Tribunal.

23. The applicant responded at hearing that she has not provided a bogus document and her migration agent provided the document. She referred to wanting to study in Australia for her future.

CONSIDERATION OF CLAIMS AND EVIDENCE

24. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 500.217 for the grant of the visa. Broadly speaking, this requires that:

- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and

- the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and

- the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and

- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

25. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate circumstances justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

26. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

27. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.

28. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 500.217(1) because she did not meet PIC 4020 as she had given or caused to be given a bogus document.

29. The evidence indicates that when applying for the Student visa on 27 February 2020 attached to the application was a certificate indicating the applicant successfully completed a Diploma of Business at HB Training Trading as Grace Training Institute. The application also referred to studying this course. As raised with the applicant the information from the Department's verification checks indicates the Diploma of Business document is non-genuine. At hearing the applicant said she had never achieved or studied the Diploma of Business at HB Training Trading as Grace Training Institute. She did not dispute that she was never awarded this certificate and never attended or studied the Diploma of Business at HB Training Trading as Grace Training Institute. The Tribunal finds the Diploma of Business issued by HB Training Trading as Grace Training Institute in the applicant's name is a bogus document within the meaning of s 5(1)(b), as it reasonably suspects it is counterfeit, being an imitation designed to pass as an original, a forgery.

30. As to whether the applicant has given or caused to be given a bogus document to the Department, she said she did not know it was provided. She said she arrived on a Visitor visa and as she wanted to study, so she went to Rizwan Muzammil to assist her to apply for a Student visa. She said she gave the agent, Rizwan Muzammil, money to be her agent and act on her behalf and he filled in the application. She said she read the application before it was submitted. When the Tribunal raised with her that it appears she had given or caused to be given a bogus document as the application which she claims she reviewed refers to her studying the Diploma of Business at HB Training Trading as Grace Training Institute and to the Diploma of Business as an attachment, she said that was not part of the application when she reviewed it. She said the agent must have added it after she read the application and that he then submitted the application without her knowledge. She said after she reviewed the application, he included reference to the Diploma of Business in the application and attached the Diploma of Business certificate. The Tribunal questioned the truth of her evidence as there is no agent recorded in the application for the Student visa submitted on 27 February 2020 to the Department and raised with her it appears she prepared and submitted the application. On the Department file there is a withdrawal of an agent, but one with a different name to that claimed by her.

31. It raised with her as of concern why she had not mentioned the involvement of the agent when preparing and submitting the application as the reason for the provision of the bogus document in the Notification of Incorrect Answers. Rather, it raised with her that the Notification of Incorrect Answers she submitted on 16 March 2022 states she had to withdraw from the Diploma of Business at HB Training due to uncertain news that came to her. It read to her what was said in the Notification of Incorrect Answers. It noted she was at that time assisted by a migration agent appointed after the application for the visa to the Department in January 2021. She said she did not know the newly appointed agent and what was contained in the Notification of Incorrect Answers. The Tribunal noted that the agent's email was after his appointment the authorised recipient, with documents as to her study sent to the Department from him. The Department decision was also sent to that migration agent.

32. For the reasons that follow it does not accept that the applicant is credible as to her application being prepared by an agent named Rizwan Muzammil, who submitted the relevant bogus document with the application for the Student visa without her knowledge, even after she reviewed the application. It follows the Tribunal finds that the applicant prepared and submitted the application to the Department including the document and therefore that the applicant has given, or caused to be given, to the Department a bogus document.

33. Firstly, it is of the view if the agent, Rizwan Muzammil, had assisted her and inserted the bogus Diploma of Business with the application for the Student visa in February 2020, without her knowledge after she reviewed it, it would have stated this in the Notification of Incorrect Answers submitted later. It did not state this rather it stated that she had to withdraw from studying the Diploma of Business course and gave reasons. It does not accept her claim she did not know what was written in the Notification of Incorrect Answers or who the agent was who prepared the Notification of Incorrect Answers, particularly as that agent was the recipient for a number of years up until and including to when the Department sent its decision.

34. Further, while not solely determinative, there is also no mention or indication in the application that the application was prepared by anyone else other than the applicant. In the application it is answered 'no' as to whether the applicant authorises another person to receive correspondence on the applicant's behalf and she gave her personal email address. While there is a withdrawal of representation on the file dated 27 January 2021, the form names another person as agent, not Rizwan Muzammil, and there is no mention to this person assisting the applicant prior to the withdrawal.

35. Therefore, having regard to the information and evidence above, the Tribunal therefore finds that the applicant has given or caused to be given to the Department a bogus document withing the meaning of s5(1), being a Diploma of Business issued by HB Training Trading as Grace Training Institute in the applicant's name.

36. Therefore, the applicant does not meet PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

37. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).

38. There is no evidence before the Tribunal that the applicant has been refused a visa in the relevant period. There is no relevant member of his family unit included in the visa application.

39. Therefore, PIC 4020(2) is met.

Should the requirements of PIC 4020(1) or (2) be waived?

40. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.

41. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.

42. At hearing the applicant referred to studying in Australia which is why she needs to be granted the visa and the benefits to her future. She submitted to the Department and Tribunal evidence of successfully completing an Advanced Diploma of Banking Services Management and the Graduate Diploma of Management (Learning) and enrolment in a Certificate IV, Diploma and Advanced Diploma in Leadership and Management. As raised with her at hearing, the Tribunal is not satisfied that her past study achievements, her wish to continue studying in Australia and the benefits to her future amounts to compelling circumstances affecting Australia's interests, or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen that justify the grant of the visa.

43. For the above reasons, the Tribunal is not satisfied that the requirements of PIC 4020(1) should be waived pursuant to PIC 4020(4).

44. Based on the above, the applicant does not satisfy PIC 4020 for the purposes of cl 500.217(1).

DECISION

45. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Dates of hearing(s): 25 November 2024

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

…

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

(a) purports to have been, but was not, issued in respect of the person; or
(b) is counterfeit or has been altered by a person who does not have authority to do so; or
(c) was obtained because of a false or misleading statement, whether or not made knowingly.

…